IN THE

Supreme Court of the United States

October Term, 1976

No. 76-358

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

KING BROWN,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

PETITIONER'S REPLY

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PETITIONER'S REPLY

Respondent's brief in opposition demonstrates convincingly that there exists between the parties a substantial disagreement about the principles and policies of the Double Jeopardy Clause, about the meaning of many of the cases cited in the petition, and especially a disagreement about the meaning of this Court's decisions in *United States* v. *Wilson,* 420 U.S. 332 (1975), *United States* v. *Jenkins,* 420 U.S. 358 (1975), and *Serfass* v. *United States,*

420 U.S. 377 (1975). These disagreements accurately reflect a similar dispute among the judges who have had to interpret *Wilson, Jenkins* and *Serfass.* Thus, there have been conflicts, not only in the results reached by many lower federal and state courts, but, as important, great differences in their analysis of this Court's decisions. *See* Petn., pp. 17-24. For the purposes of this petition, the existence of such serious dispute is more important than the merits of the dispute itself, and so we will not repeat or expand upon those arguments, outlined in our petition, that we think support our interpretation of these cases.

The brief in opposition does, however, raise several points that require response.

1. Although respondent does not "feel equipped" to argue the point or urge it upon this Court, he nevertheless raises the specter of an "independent and adequate state ground" upon which the decision below might have been based. (Brief in opposition, p. 1, n.1; *see also* pp. 2, 4.) The Court of Appeals, however, based its decision entirely on the Federal Constitution. In 1974, the Court of Appeals upheld N.Y. CPL section 450.20(2), the statute that grants the state a right to appeal in a case such as this one. *People* v. *Fellman,* 35 N.Y.2d 158, 316 N.E.2d 569, 359 N.Y.S.2d 100 (1974), *remit. amended,* 35 N.Y.2d 853, 321 N.E.2d 880, 363 N.Y.S.2d 89 (1974). In the instant case, the same Court of Appeals reversed itself. The only relevant intervening circumstance was this Court's decisions in *Jenkins, Wilson* and *Serfass.* In these three cases this Court interpreted the Double Jeopardy Clause of the United States Constitution. Several times in the opinion below the Court of Appeals said explicitly that it was reversing itself and declaring N.Y. CPL section 450.20(2) unconstitutional only because it was constrained to do so by this Court's interpretation of the Federal Constitution. We quote just two examples:

> We recently rejected a similar constitutional challenge to the People's statutory right to appeal such an order (*People* v. *Fellman,* 35 NY2d 158, mot to amd rem granted 35 NY2d 853). Subsequent to our decision in *Fellman,* however, the United States Supreme Court decided three cases which cast grave doubt as to the continuing viability of the *Fellman* decision (*United States* v. *Wilson,* 420 U.S. 332, and *United States* v. *Jenkins,* 420 U.S. 358, decided February 25, 1975, and *Serfass* v. *United States,* 420 U.S. 377, decided less than a week later on March 3, 1975). We reach our decision today under constraint of these decisions, and accordingly overrule our holding to the contrary, in *People* v. *Fellman,* 35 NY2d 158, *supra.* (Petn., App. E, pp. 14a-15a).
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>
> While there is much in logic to support [the state's analysis of the Double Jeopardy Clause], we conclude that the Supreme Court by its recent trilogy of double jeopardy cases has expressly rejected any such analysis and has interpreted the federal double jeopardy clause exactly as did the court below. As that clause, found in the federal constitution, is binding on the states (*Benton* v. *Maryland,* 395 US 784), we accordingly are constrained to conclude that the order at the Appellate Division dismissing the appeal to that Court must now be affirmed. (Petn., App. E, p. 18a).

2. In our petition we suggest that the Court of Appeals was wrong for two separate reasons. First, the state's appeal should have been allowed because reprosecution

would not violate any of the policies or principles of the Double Jeopardy Clause. The prosecutor was not harassing the defendant or seeking a trial before a more favorable tribunal. Most importantly, the defendant was not "acquitted" at the first trial. Second, the state should have been allowed to appeal because the defendant had an opportunity before trial to seek the legal ruling on which he later prevailed but did not do so until after jeopardy attached. Each of these reasons, we suggest, raises a significant question which warrants review by this Court. (Petn., p. 28.)

Respondent appears to concede what most of his argument amply illustrates—that the first, and more important, of these two questions is raised clearly in this case. According to respondent, however, the second question is not so clearly involved here because defense counsel had a good excuse for not making the motion before trial. (Brief in opposition, p. 6.) Regardless of whether defense counsel's excuse is good or not (which we will discuss below), the undisputed facts remain: that New York provided a way for defense counsel to raise his legal point by moving before trial to dismiss the indictment under N.Y. CPL section 210.20 (1) (b) (*see* Petn., pp. 4-5); that he did not do so, although he moved to dismiss the indictment on unrelated grounds under other sections of the Criminal Procedure Law;* and that he waited to make his motion until

* Respondent says that he moved to dismiss the charge "on a number of grounds" on February 21, 1973, and on April 1, 1974. (Brief in opposition, p. 6.) On April 1, 1974, respondent moved to dismiss the indictment under N.Y. CPL section 200.50(7), on the grounds that its allegations were too conclusory. He also moved, under an unspecified section of the Criminal Procedure Law, to dis-

(footnote continued on next page)

after the state had put on its case, that is, until after jeopardy attached. We urge here, as we did in the Court of Appeals below, that these circumstances ought to be relevant in deciding whether the state's appeal is constitutionally permissible. *See Serfass* v. *United States,* 420 U.S. at 394. The Court of Appeals, because it felt constrained to apply a mechanical rule, ignored these circumstances entirely. It is difficult to imagine a case that raises this issue more clearly.

Moreover, the reason advanced by respondent for his failure to make the appropriate motion before trial is no reason at all. What respondent suggests is this: one phrase in the arresting officer's testimony at the preliminary hearing ("that is up to you") established, or could have been construed to establish, that the officer in fact agreed to act corruptly on Brown's behalf. Therefore, because of this phrase, defense counsel did not move to dismiss the subsequent indictment and raise the question whether the officer agreed to act corruptly. At the trial, however (according to respondent), this one phrase was not repeated; so then, for the first time, defense counsel had grounds to make the motion upon which he prevailed. (Brief in opposition, p. 6.)

First, there is nothing about the preliminary hearing testimony, including the quoted phrase, that suggests, even

miss the case because he claimed he had been prejudiced by a delay in prosecution. February 21, 1973, the other date mentioned in respondent's brief in opposition, was two days after respondent's arrest. He had not yet been indicted. On that day there was a preliminary hearing held to determine whether respondent's case should be referred to the grand jury. At the end of the hearing, respondent moved to dismiss the case because, he argued, the evidence showed he had been entrapped.

remotely, that the officer agreed to act corruptly on Brown's behalf. The officer's testimony was clear. Brown came into the stationhouse and made a corrupt offer. The officer put Brown off, informed his superiors, and then had further conversations with Brown. In these conversations, the officer played along with Brown ("that is up to you") until Brown repeated his offer—this time for the benefit of a tape recorder. When the offer was repeated, Brown was arrested.*

Second, the testimony at trial was to precisely the same effect. The officer played along with Brown until the offer was repeated. Then Brown was arrested. The conversation leading to the second offer and the arrest was tape-recorded and played to the jury. The tape shows that, contrary to respondent's assertion, the arresting officer used almost exactly the same phrase he had previously described at the preliminary hearing. "You know, it's up to you what you want to do." (People's Exhibit 1, People's Exhibit 2 for identification, p. 4).** In fact, he repeated in essence the same phrase five more times—four times while talking to Brown,† and once while talking to Angel Rod-

* The full transcript of the preliminary hearing, including the four pages appended to the respondent's brief in opposition, is attached to this Reply as Appendix H.

** People's Exhibit (Peo's Exh.) 1 is the tape played to the jury. Peo's Exh. 2 for identification (Peo's Exh. 2-ID) is a transcript of the tape which was given as an aid to the jury while the tape was being played. (Minutes of trial, April 4, 1974, pp. 19, 25, 32; Minutes of trial, April 10, 1974, pp. 47-51).

† "Whatever you want to do, you let us know." (Peo's Exh. 2-ID, p. 2); "I mean whatever you want to do, do it now" (Peo's Exh. 2-ID, p. 4); "Well, what do you want to do?" (Peo's Exh. 2-ID, p. 5); "What do you want to do?" (Peo's Exh. 2-ID, p. 11).

riguez, the man Brown wanted to free.* After hearing this testimony at trial, defense counsel successfully moved to have the indictment dismissed. Based on what he knew before trial, he could have moved, before trial, for the same relief under C.P.L. section 210.20(1)(b). Instead, he waited until jeopardy attached.

Finally, respondent tries to minimize our second argument by pointing to our alleged failure to make it in the Appellate Division (Brief in opposition, pp. 5, 6). However, at the time we filed our briefs in the Appellate Division, the state's right to appeal in this case was clearly established by *People* v. *Fellman, supra. Jenkins, Wilson* and *Serfass* had not yet been decided.** Thus, it was not until we filed our brief in the Court of Appeals that we had an opportunity to assess the effects of *Jenkins, Wilson* and *Serfass* and to make arguments based on these cases.

* "It's up to you. You want him to get you out or don't you?" (Peo's Exh. 2-ID, p. 8).

** The state's (appellant's) brief in the Appellate Division was filed on December 11, 1974. The respondent's brief was submitted on February 11, 1975. The state's reply brief was submitted on February 19, 1975. *Wilson* and *Jenkins* were decided on February 25, 1975, and *Serfass* was decided on March 3, 1975. The oral argument was on March 5, 1975, just two days after *Serfass* was decided. On that day the respondent filed a supplemental memorandum in which he discussed *Wilson* and *Jenkins,* but not *Serfass.*

Conclusion

Respondent has attempted to create doubts about whether this case raises the important constitutional issue outlined in our petition. These attempts are not supported by the record. The case does in fact raise, as clearly as any case is likely to raise, the two issues left open in *Serfass*. 420 U.S. at 394, *supra*. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX H

Minutes of Preliminary Hearing

CRIMINAL COURT OF THE CITY OF NEW YORK

PART AP-6 COUNTY OF NEW YORK

Docket: N309923

CHARGE: 200.00

THE PEOPLE OF THE STATE OF NEW YORK

against

KING BROWN

February 21, 1973

Before:

Hon. MILTON SAMORODIN, Presiding Judge

Appearances:

JUAN ORTIZ, Esq.
Assistant District Attorney
Attorney for the People

LEGAL AID SOCIETY
100 Centre Street
New York, New York

By: JAMES GOLDFARB, Esq.
Attorney for the Defendant

ROBERT ELMAN
Court Reporter

PHILIP MURPHY
Bridgeman

Minutes of Preliminary Hearing

Preliminary Hearing

Bridgeman: Docket Number N309923, King Brown, charged with 200.00 of the Penal Law. This matter is marked ready for a hearing.

Mr. Ortiz: The People call Officer Stewart.

PATROLMAN TIMOTHY STEWART, having been called as a witness, testified as follows:

The Court: Raise your right hand. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

The Witness: I do.

The Court: State your name, your shield number, and your assignment.

The Witness: Patrolman Timothy Stewart, Shield Number 24793, 26 Precinct Anti-Crime Unit, Police Department, City of New York.

Direct examination by Mr. Ortiz:

Q. Patrolman Stewart, I would like to bring your attention to February of this year, and ask you if you were on duty at 1:30 in the morning? A. Yes, I was.

Q. Were you at the 26th. Precinct? A. Yes sir, I was.

Q. Where is that located? A. At 520 West 126th. Street, in Manhattan.

Q. Will you tell us what happened, if anything, at that time? A. I was approached by the defendant.

Q. Who is that? A. Mr. Brown.

Minutes of Preliminary Hearing

Q. Sitting here? A. Sitting right here.

The Court: What is your name, sir?

The Defendant: Cleveland Brown.

The Court: Let the record indicate, the officer identified the defendant.

A. Cont'd. I was asked by the defendant, if he could talk to me in regards to a friend of his, who had been arrested by myself.

Q. Did he mention any names? A. Yes, the defendant's friend was Angel Rodriguez, who I had arrested earlier that evening. I said, what do you wish to speak to me about? The defendant said, I would like to see what I could do for him. I said, what exactly do you mean? He said, I am willing to give you 75 or 100 Dollars, if my friend can be dropped of all the charges against him. I then informed the defendant, I was placing him under arrest for bribery, and informed him of his rights.

Q. Did you place him under arrest at that point, when he first came into the station house and spoke to you? A. The first time he came into the station house, was approximately 12:15. At that time, I had a conversation with the defendant. I then notified my Superior Officers the conversation I had transacted, who notified Internal Affairs Department of the Police Department.

Q. Then did you have a subsequent conversation after that? A. Yes sir, I did.

Q. What was the substance of that conversation? Was it the same as you stated? A. Yes sir, it was.

Q. Where did that second conversation take place? A. In the sitting room of the 26th. Precinct.

Q. Was anybody with you at the time? A. Yes, Patrolman James O'Connor, of the 26th. Anti-Crime Unit.

Mr. Ortiz: No further questions.

Cross-examination by Mr. Goldfarb:

Q. Patrolman Stewart, did you make any written notation concerning this incident? A. Yes sir.

Q. Do you have any of those written notations with you in Court today? A. No sir, I don't.

The Court: Patrolman, in the event you are required to testify in any future proceeding in this matter, be sure to bring your memo book and any other documents in which you have notations.

The Witness: Yes sir.

Q. What written notations did you make? A. I made a notation of the arrest.

Q. What forms did you fill out specifically?

Mr. Ortiz: Objection, Your Honor.
The Court: Sustained.

Q. What time did you make the arrest of Mr. Rodriguez? That is the man referred to by my client? A. Yes sir, I did.

Q. When and where, was that arrest?

Mr. Ortiz: Objection.
The Court: Sustained.

Q. At what time was that arrest?

Mr. Ortiz: Objection.
The Court: Sustained.

Q. How long had Mr. Rodriguez been in the precinct, when my client first appeared?

Mr. Ortiz: Objection.
The Court: Sustained.

Q. What time did my client first appear in the precinct, and speak with you? A. 12:15.

The Court: A.M., or P.M.?
The Witness: A.M., the 20th.

Q. Where did you first see him? A. In front of the desk, the front desk.

Q. Were there any other officers present at that time? A. Several.

Q. Can you name them and their shield numbers? A. Patrolman James O'Connor of the 26th. Anti-Crime Unit, is the only officer I would know offhand.

Q. How many officers would you say were there approximately? A. Four or five.

Q. What was said by my client at that time? A. Just that he wanted to speak with me.

Q. What was your reply? A. I said, I will be right with you.

Q. What was the next thing said? A. We walked into the sitting room, and the conversation I just testified to, was exactly what happened.

Q. Who was in the sitting room? A. At that time?

Q. That is right. A. Myself.

Q. Was Patrolman O'Connor there at that time? A. Not on the first conversation.

The Court: Were you alone in the sitting room?

The Witness: On the first, the original conversation.

The Court: All by yourself?

The Witness: Yes, Your Honor.

The Court: No one else was there with you?

The Witness: Not on the original, the first conversation.

The Court: With whom did you have the conversation?

The Witness: The defendant was with me.

Q. What was said, exactly? A. I already testified, that the defendant stated, that he wished to see what he could do for his friend.

Q. Were those his exact words? A. I don't recall his exact words at this time.

Q. Then what did you say? A. I said, what do you mean? The defendant stated, he wanted to get his friend free, and he would be willing to pay 75 or 100 Dollars.

Q. What did you say immediately, when he said that? A. I said, I would have to speak with my partner.

Q. Did my client at any time, take out any money whatsoever? A. No sir, he did not.

Q. What happened after you left the room? Who did you speak with? A. As I previously testified, I notified my superior.

Q. Who is that? A. Sergeant Martin Veilson, of the 26th. Anti-Crime Unit, and the Internal Affairs Division.

Q. What happened next? A. Approximately an hour and ten minutes, or an hour and fifteen minutes later, I had another conversation with the defendant, and this time Patrolman O'Connor was present.

Q. Was that second conversation taped? A. Yes sir.

Mr. Ortiz: Objection.

The Court: I will let the answer stand.

Q. Do you have the tape with you in Court today?

Mr. Ortiz: Objection.

The Court: Sustained.

Q. Was Patrolman O'Connor the only other officer present, at the second conversation? A. Yes sir, he was.

Q. Who was wired at that conversation? A. I—

Mr. Ortiz: Objection.

The Court: Sustained.

Q. What was said at that conversation? A. The defendant stated to me, that he was willing to pay 75 or 100 Dollars, to have all the charges dropped against the defendant Rodriguez.

Q. When you went in the room for the second conversation, who was the first one to speak?

Mr. Ortiz: Objection.

The Court: Overruled.

A. The defendant was.

Q. What was your response to his statement? A. What was my response to his statement?

Q. That is right. A. The defendant asked me something. I said, I would be with you in a minute.

The Court: What did the defendant ask you?

The Witness: He asked me, if he could leave.

The Court: Which defendant are you referring to?

The Witness: Referring to Mr. Brown. Mr. Brown asked me, if he could leave.

The Court: Were those his first words to you?

The Witness: Yes.

Q. What did you say? A. I said, just a minute.

The Court: Was that what he said to you before he asked what he told you, he would like to have his friend, Mr. Rodriguez freed?

The Court: Sustained.

Q. You said, that is up to you, and what was said next? A. I don't remember verbatim, what the actual exchange of words were.

Q. What do you remember? A. I remember the defendant again stating, that he wished to have his friend freed of all charges, and he is willing to pay 75 to 100 Dollars.

Q. Did he state, who this payment was to be made to? A. I don't remember.

Q. Do you remember if he ever stated, that he would be willing to pay the auto company, for any amount for

which the car was overdue, and which was owed to the auto company, which was involved in Mr. Rodriguez's case? A. No sir, the initial conversation the defendant said, he wished to give me 75 to 100 Dollars.

Q. Did there come a time, at which you searched my client?

The Witness: No, this is regarding the second conversation. This is after he had already stated to me, that he wished to have his friend freed, and offered me the sum of 75 to 100 Dollars.

Q. And then you told Mr. Brown that he could not leave, is that correct? A. I never told Mr. Brown he could not leave at all.

Q. When he said, could he leave? A. I said, just a minute. I will be with you in a minute.

Q. What happened after a minute was over? A. Patrolman O'Connor then walked into the room, and Mr. Brown said, what are we going to do?

Q. What was your response? A. I said, that is up to you.

Q. What did Patrolman O'Connor say, during this time?

Mr. Ortiz: Objection.

The Court: Sustained.

Q. Did you ever find any money whatsoever on my client?

Mr. Ortiz: Objection.

The Court: Sustained.

Q. The tape that was made, was that the second conversation?

Mr. Ortiz: Objection, I—

Mr. Goldfarb: I would ask the District Attorney, to allow me to ask the question, before he objects.

The Court: Let Mr. Goldfarb finish his question.

Q. Was the total of the second conversation taped?

Mr. Ortiz: Objection.

The Court: Sustained.

Q. How long did the first conversation take?

The Court: By the first conversation you mean, the one shortly after midnight, is that right?

Mr. Goldfarb: Yes.

A. Approximately 10 minutes.

Q. And that duration of time between the first and second you said, was a little over an hour, is that correct? A. That is correct.

Q. How long did the second conversation take, from the time you walked into the room, until the conversation ended? A. Approximately 20 minutes.

Q. Is Patrolman O'Connor in Court today? A. No sir.

Mr. Ortiz: Objection.

The Court: Overruled, let the answer stand.

Q. Did my client say, he would pay you right then and there?

Mr. Ortiz: Objection.

The Court: Sustained.

Mr. Goldfarb: No further questions.

Mr. Ortiz: That is the People's case on the hearing.

Mr. Goldfarb: Your Honor, at this time, I move to dismiss the charges against my client, on the grounds that the People have failed to show reasonable cause to believe he committed the crime with which he is charged. Specifically, Your Honor, I believe that there is a serious issue of entrapment in this case. I believe it was the officer's own testimony, that my client at a certain point, wanted to leave, and was told, he should not leave. I would ask, that The Court dismiss the charges against my client on those grounds.

The Court: On the basis of the officer's testimony, I find there is reasonable cause to believe that a crime has been committed by the defendant, and accordingly, the motion to dismiss is denied. The defendant is held for the Grand Jury. Is your client still remanded? Do I hear anything with respect to bail?

Mr. Goldfarb: Yes, Your Honor, my client informs me, that he has lived at his current address for three months, and he has lived in New York City for 20 years.

The Court: I don't see how your client has lived in New York City for the last 20 years, when he has been in jail so many times. There are seven pages of yellow sheets.

Mr. Goldfarb: I don't believe, that my client looks upon jail as a permanent residence.

Minutes of Preliminary Hearing

Mr. Ortiz: The People would ask for 5000 Dollars bail.

The Court: On the basis of the defendant's prior record, I am fixing Insurance Company Bond of 10,000 Dollars, or 6000 Dollars cash bail.

Bridgeman: You may communicate free of charge by letter or telephone, from the office of the Warden.

Certified to be a true and accurate transcript.

Robert Elman
Court Reporter